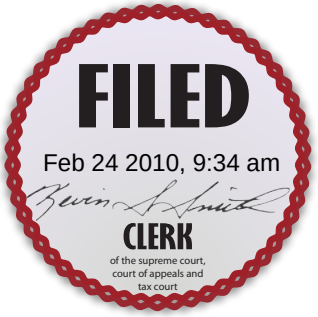

APPELLANT PRO SE:

D. RICHARD CRAFT
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

BRYAN LEE CIYOU
Ciyou & Dixon, P.C.
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

D. RICHARD CRAFT,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A05-0907-CV-370
	)	
ANNE M. CRAFT,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Shaheed, Judge
The Honorable Victoria Ransberger, Magistrate
Cause No. 49D01-0307-DR-1234

February 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

D. Richard Craft ("Father"), *pro se*, appeals the trial court's denial of his motion for relief from judgment. Father raises one issue, which we revise and restate as whether the trial court abused its discretion by denying Father's motion for relief from judgment under Ind. Trial Rule 60(B). We affirm.[1]

Before addressing the relevant facts and the arguments raised by Father, we note this court issued an order on September 10, 2009, which granted Father's Motion to Proceed In Forma Pauperis and stated: "In a civil case, pauperis status relieves the Appellant only from the payment of the filing fee to the Court of Appeals. If Appellant requires a transcript for his appeal, and he is unable to afford the cost of producing one, the Appellant must proceed under Indiana Appellate Rule 31." September 10, 2009 Order.

Father did not submit a transcript of the hearings involved in these proceedings or utilize Ind. Appellate Rule 31.[2] Rather, in Father's reply brief, he argues:

> Trial Rule 60b does not in itself require transcripts be attached. As there was not a hearing held on Father's Motion for Relief, there was no

[1] We note that Father's brief did not contain a statement of case as required by Ind. Appellate Rule 46(A)(5). Father failed to provide the applicable standard of review as required by Indiana Appellate Rule 46(A)(8)(b). Father also failed to include the trial court's judgment with his brief, which is required by Ind. Appellate Rule 46(A)(10).

[2] Ind. Appellate Rule 31(A) provides:

> If no Transcript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection. The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency. The statement of evidence shall be attached to the motion.

> transcript to present the Appeal Court. At Father's initial filing of his Notice of Appeal, and in his Motion for relief, he did request transcripts of prior hearings his Motion for Relief referenced as Father felt that they might help the Court in reaching a decision. After finding out the cost of the transcripts, even with the Pauperis discount, Father did not have the funds to acquire them. And as this is an appeal of the denial of his Motion for relief, not a direct appeal of the previous hearings, and that part of the issue is custody of minor children who's health and well being are in question under the Trial Court's orders, there was not a pressing need for the delay in acquiring a Statement of Evidence offered under Appellate Rule 31 as Father believes there was ample evidence available to show just cause for ordering a rehearing, including Father's sworn Motion for Relief and attached exhibits that the Trial Court used to issue it's [sic] Final Order.

Appellant's Reply Brief at 2-3.

The Indiana Supreme Court addressed a similar situation in Pabey v. Pastrick, 816 N.E.2d 1138, 1141-1142 (Ind. 2004), reh'g denied. There, the appellant failed to submit a transcript of the evidentiary hearing. The appellant argued that no transcript was necessary because he did not contend that the trial court's findings of fact were unsupported by the evidence; in fact, he repeatedly cited the trial court's findings of fact and did not reference facts outside those found by the trial court. 816 N.E.2d at 1142. Relying in part upon Ind. Appellate Rule 49(B), which provides that the failure to include an item in an appendix shall not waive any issue or argument, and Ind. Appellate Rule 9(G), which allows supplemental requests for transcripts to be filed, the court held that the appellants' failure to submit a transcript was not a basis for dismissing the appellant's appeal. Id.

The Court also relied upon its opinion in In re Walker, 665 N.E.2d 586, 588 (Ind. 1996). Id. In Walker, the appellants did not submit a transcript and argued that a

transcript was unnecessary because there was no challenge to the trial court's findings of fact and the appellate review entailed determining only whether the findings supported the judgment and whether the conclusions of law and the judgment were clearly erroneous based upon the findings. 665 N.E.2d at 588. The Court noted that the "failure to include a transcript works a waiver of any specifications of error which depend upon the evidence." Id. (quoting Campbell v. Criterion Group, 605 N.E.2d 150, 160 (Ind. 1992), and discussing prior appellate rules). However, the Court encouraged "litigants to utilize and reviewing courts to permit the utilization of procedures that minimize expense and administrative burdens for the parties and the court system." Id. Consequently, the Court addressed the issues presented in the appeal. Id.

Based upon Pabey and Walker, we will attempt to address the issue raised by Father. See Fields v. Conforti, 868 N.E.2d 507, 511 (Ind. Ct. App. 2007). However, any arguments that depend upon the evidence presented to the trial court are waived. Id. (citing Walker, 665 N.E.2d at 588; Kocher v. Getz, 824 N.E.2d 671, 675 (Ind. 2005) (holding that, where the appellant failed to provide a transcript of the trial court's hearing on his motion to stay execution and request for bond less than the full amount of the judgment, appellant failed to demonstrate that the trial court abused its discretion)); see also Ctr. Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762, 769 (Ind. Ct. App. 2008) (holding that "[b]ecause the City did not provide us with the transcript as required by Ind. Appellate Rule 9(F)(4), that argument is waived"), trans. denied.

The relevant facts follow. In July 2003, Anne M. Craft ("Mother") filed a Petition for Legal Separation and Motion for Mutual Temporary Restraining Order for Assets and Children.[3] On August 18, 2004, the trial court entered a decree of dissolution.[4]

After various motions and a hearing, the trial court entered an order regarding modification of custody, contempt, and related matters on December 5, 2005. The trial court concluded that there had been a substantial change in the factors set forth in Ind. Code § 31-17-2-8 and awarded Mother sole legal and physical custody of the parties' children. The trial court awarded Father parenting time pursuant to the Parenting Time Guidelines plus an additional overnight on Sunday night of Father's every other weekend parenting time and overnights on Wednesday and Thursday during the weeks he does not have weekend parenting time. The court found that the parties agreed to send the children to private school at the time of their divorce, but that Father no longer wants to be obligated to pay this expense. The court also found that the parties had already made the payments for the 2005-2006 school year and concluded that "[d]ue to the present circumstances, the Court will not require the parties to continue to pay for private school after the conclusion of this year." Appellant's Appendix Volume I at 36.

On May 24, 2007, Mother filed a petition for Modification of Visitation.[5] On June 13, 2007, Father filed a Petition for Modification of Child Custody.[6] On April 1, 2008,

[3] The record does not contain a copy of Mother's petition or motion.

[4] The record does not contain a copy of the decree of dissolution.

[5] The record does not contain a copy of this petition.

Mother filed a Petition for Contempt.[7] On June 16, 2008, the trial court entered an Order on Modification of Custody and Other Matters, which denied Father's petition for a change of custody and Father's request for additional parenting time. The order also stated that "[i]f Mother elects to continue to have the children in private school, Father will be required to pay one third or 33% of the regular tuition and other charges for those schools." Id. at 32.

On May 28, 2009, Father, *pro se*, filed a twelve-page motion for relief from judgment making numerous allegations. On June 5, 2009, Mother filed an Objection to Father's Motion for Relief from Judgment.[8] The trial court denied Father's motion.

Before we reach the merits of Father's claims, we note that Father has filed this appeal *pro se*. "An appellant who proceeds pro se is 'held to the same established rules of procedure that a trained legal counsel is bound to follow and, therefore, must be prepared to accept the consequences of his or her action.'" Thacker v. Wentzel, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003) (quoting Ramsey v. Review Bd. of Ind. Dep't of Workforce Dev., 789 N.E.2d 486, 487 (Ind. Ct. App. 2003)). "It is well settled that the duty of presenting a record adequate for intelligent appellate review on points assigned as error falls upon the appellant, as does the obligation to support the argument presented with authority and references to the record pursuant to App. R. 46(A)(8)."

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[6] The record does not contain a copy of this petition.

[7] The record does not contain a copy of this petition.

[8] The record does not contain a copy of this objection.

AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc., 816 N.E.2d 40, 44 (Ind. Ct. App. 2004).

The sole issue is whether the trial court abused its discretion by denying Father's motion for relief from judgment under Ind. Trial Rule 60(B). A grant of equitable relief under Ind. Trial Rule 60 is within the discretion of the trial court. We review a trial court's ruling on Rule 60 motions for abuse of discretion. Outback Steakhouse of Florida, Inc. v. Markley, 856 N.E.2d 65, 72 (Ind. 2006). "An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief." Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 558 (Ind. Ct. App. 1999), reh'g denied, trans. denied, cert. denied, 529 U.S. 1021, 120 S. Ct. 1424 (2000). When reviewing the trial court's determination, we will not reweigh the evidence. Zwiebel v. Zwiebel, 689 N.E.2d 746, 748 (Ind. Ct. App. 1997), reh'g denied, trans. denied.

Ind. Trial Rule 60(B) "affords relief in extraordinary circumstances which are not the result of any fault or negligence on the part of the movant." Dillard v. Dillard, 889 N.E.2d 28, 34 (Ind. Ct. App. 2008) (quoting Goldsmith v. Jones, 761 N.E.2d 471, 474 (Ind. Ct. App. 2002), reh'g denied). "On a motion for relief from judgment, the burden is on the movant to demonstrate that relief is both necessary and just." Id. at 33 (quoting G.B. v. State, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999)). A trial court must balance the alleged injustice suffered by the moving party against the interests of the party who

prevailed and society's interest in the finality of judgment. Showalter v. Brubaker, 650 N.E.2d 693, 698 (Ind. Ct. App. 1995).

Father appears to argue that there was not a major change between the December 5, 2005 order and the June 16, 2008 order to justify initiating shared private school expenses. Father also states that "[a]s part of the Motion for Relief there were two attachments that supported items 4 and 5 of the Motion." Appellant's Brief at 5. Father also argues that the trial court failed to make orders known. Specifically, Father argues that he "received in the mail a copy of his Order with the words 'Denies said request' written on it," but "[i]t was not until several weeks later when Father was reviewing the Jacket Entries that he discovered the Trial Court had written down reasons for the denial but failed to provide those reasons to either party." Id. Father does not cite to authority, develop these arguments, or cite to the record in support of these arguments. Consequently, these arguments are waived. See, e.g., Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding argument waived for failure to cite authority or provide cogent argument), reh'g denied, trans. denied.

Father argues that "Items 7 and 8" of his motion for relief from judgment document "many legal issues and legal errors with the June 16 2008 Order and with the hearings held including, but not limited to, failing to allow relevant witnesses, failing to allow relevant testimony, failing to inform of Orders issued, errors in statements from the

bench, and failing to uphold Orders."[9] Appellant's Brief at 5. Father argues that "[t]hese serious legal issues were not addressed in the Trial Court's denial, and as they can be shown to be true from the transcript of the hearings, they have not been denied by opposing counsel." Id. Even assuming that Father had provided the transcripts, we conclude that Father has waived these arguments because he does not cite to authority, cite to the record, or develop these arguments. See, e.g., Loomis, 764 N.E.2d at 668 (holding argument waived for failure to cite authority or provide cogent argument).[10]

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[9] Items 7 and 8 in Father's motion for relief from judgment presented twenty-six different arguments. As an example, in Item 7, Father challenged the trial court's conclusion in its June 2008 order that "Father is prohibited from smoking when the children are with him." Appellant's Appendix Volume I at 32. Specifically, in Item 7, Father alleged:

> During the series of hearings the Court heard evidence that Father has smoked since childhood, throughout the marriage, and continues to do so after the divorce. Many hearings have been held since the parties separated in 2004, and Mother has repeatedly brought up Father's smoking which the previous Courts have correctly rejected. There was no testimony of a major or ongoing change to justify the Current Court Order restricting Father's smoking.

See Appellant's Brief. One of the arguments included in Item 8 follows:

> At the conclusion of the hearing on May 18th, 2008, the Court ordered the attorneys to produce the Findings and Conclusions. While Father respects the legality of this, the Court still has a responsibility to verify the documents produced by the attorneys meet legal and ethical guidelines prior to affixing the court[']s signature. The Current Court Order dated June 16th, 2008 contains so many illegal, questionable, unjustified, and or unclear sections that it is possible the court did not fulfill this responsibility.

Id.

[10] By separate order, we are denying Mother's Motion to Strike and Request for Appellate Fees. Indiana Appellate Rule 66(E) states: "The Court may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Although this rule provides us with discretionary authority to award damages, we must use extreme restraint because of the potential chilling effect upon the exercise of the right to appeal. Quigg Trucking v. Nagy, 770 N.E.2d 408, 413 (Ind. Ct. App. 2002) (citing Donaldson v. Indianapolis Pub. Transp. Corp., 632 N.E.2d 1167, 1172 (Ind. Ct. App. 1994)). Indiana appellate courts have classified claims for appellate attorney fees into substantive and procedural bad faith claims. Boczar v. Meridian Street Found., 749 N.E.2d 87, 95 (Ind. Ct. App. 2001). To prevail on a substantive bad faith claim, the party must show the appellant's

For the foregoing reasons, we affirm the trial court's denial of Father's motion for relief from judgment.

Affirmed.

MATHIAS, J., and BARNES, J., concur.

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contentions and arguments are utterly void of all plausibility. Id. Substantive bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002). Procedural bad faith "is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Id. We cannot say that Father's arguments are utterly devoid of all plausibility or that Father's brief is written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. While we decline to remand for a determination of appellate attorney fees, we caution Father that his failure to comply with the Appellate Rules presents us with a close call as to Mother's request for appellate fees, and if such a failure reoccurs in the future, we will not hesitate to exercise our authority pursuant to Appellate Rule 66(E) to award appellate attorney fees to Mother.